

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO: Z-832329
Issued to: Ray C. GIMBERT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2011

Ray C. GIMBERT

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 25 September 1973, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia suspended Appellant's seaman's documents for one month outright plus two months on six months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as a tankerman on board the McAllister Barge 100 under authority of the document above captioned, on or about 22 August 1973, Appellant negligently failed to supervise cargo discharge operations while the barge was bunkering the M/V AEGEAN WAVE, thereby contributing to a spillage of cargo from said barge's discharge hose into the waters of Hampton Roads, Norfolk, Virginia.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a report of pollution violation and the testimony of a witness.

In defense, Appellant offered in evidence the testimony of a witness and his own testimony.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of one month outright plus two months on six months' probation.

The entire decision and order was served on 25 May 1974. Appeal was timely filed and a brief in support of appeal was received on 9 August 1974.

FINDINGS OF FACT

On 22 August 1973, Appellant was serving as a tankerman on

board the McAllister Barge 100 and acting under authority of his document while the barge was in the port of Norfolk, Virginia. At approximately 0900 on the above date, Appellant relieved the previous tankerman on the McAllister Barge 100 and continued the process of loading the M/V AEGEAN WAVE with fuel oil. After completing the transfer of cargo, Appellant opened air into the line in order to blow out the transfer hose. He then shut off the air intake, allowed the pump to pull a vacuum on the trunk line of the barge, and indicated to the deck personnel on the AEGEAN WAVE to close off their valve. After a short interval, the ship's crew was directed to disconnect the cargo hose and to guide it up and over the deck of the ship while Appellant operated the winch. Because the boom did not extend inboard of the vessel more than a few feet it was necessary to lift the approximately twenty feet of hose on the deck vertically until it cleared the deck at which time the boom would be maneuvered so as to swing the hose above the barge. Before this operation could be completed, the end of the hose was for some reason dropped by the deck crew causing the hose to swing around and strike the guard rail of the vessel. The force of the hose making contact with the guard rail expelled some four to five gallons of oil onto the deck of the barge and into the waters of Hampton Roads.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Because of the disposition of this case it is unnecessary to recite the specific arguments raised by Appellant.

APPEARANCE: Vandeventer, Black, Meredith and Martin of Norfolk, Va, by G.W. Birkhead, Esq.

OPINION

In this case, Appellant was charged with negligently failing to supervise cargo discharge operations. Negligence is defined by pertinent Coast Guard regulations at 46 CFR 137.05-20(a) (2) as:

"...the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform."

In order to prove the charge, it is necessary for the Coast Guard to prove that Appellant's conduct in some manner failed to conform to the standard of care required by the reasonable prudent tankerman under the same circumstances as confronted Appellant. It

is unnecessary that Appellant use every possible precaution to prevent the discharge of oil. He need only exercise that quantum of care required by the reasonably prudent person serving in the same capacity.

I find that the evidence adduced at the hearing is insufficient to carry the Coast Guard's burden of proving by substantial evidence that Appellant negligently failed to supervise. The only evidence offered by the Investigating officer was the report of oil pollution violation which merely proved the obvious, that there had been a discharge, and the testimony of the Chief Petty Officer who investigated the discharge. His testimony consisted of hearsay statements as to what he was told by Appellant, but, in any event, shed no light on what Appellant did or did not do so far as his obligation to supervise the discharge operation is concerned. In fact, the only evidence available from which the Judge could have concluded that Appellant acted unreasonably was Appellant's own narration of the events which took place.

Appellant's testimony was to the effect that he followed all of the normally followed procedures in executing his obligations. He blew out the line to remove the residue of oil; he instructed the vessel's crew, who were responsible for connections and disconnections of the transfer hose, to close the manifold valve; he allowed the pump to put a vacuum on the line to suck any other remaining residue back into the trunk line, and he directed the crew to disconnect and guide the hose as he operated the winch. None of these acts point to any negligence on the part of Appellant, rather they display an exercise of reasonable caution. The only evidence developed which might possibly lead to a finding of negligence was that Appellant had not insured that a blank or some other valve type device was placed in the end of the line. Obviously, had there been such a device this discharge would not have occurred, but that fact alone does not supply the missing quantum of evidence.

If the failure of Appellant to supply a blank or other device is to be considered as evidence of a negligent failure to supervise, there must be at least some evidence that the reasonably prudent tankerman would have utilized such a device. No such evidence appears from the record. To the contrary, there was evidence that it was not the custom of the trade to use the device in this type of operation and that in fact, Appellant's employer did not even provide a device which he could have used. It may also be noted that the pertinent regulations regarding transfer operations, 46 CFR 35, do not require the device. While it is true that evidence of custom and usage is not conclusive as to the proper standard of care, it is evidence which must be considered.

Here there was no evidence that the custom itself was negligent; therefore, I find that reasonable supervision of the loading operation did not require that blanks be supplied at the in question.

In sum, the evidence on the record fails to disclose any manner in which Appellant either failed to perform an act which a similarly situated, reasonably prudent person would have performed or committed an act which was unreasonable. This lack of substantial evidence cannot be supplied by speculation or wishful thinking. Without substantial evidence to support the charge alleged, the order of the Administrative Law Judge must be vacated and the charge dismissed.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia on 25 September 1973, is VACATED and the charge is DISMISSED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 30th day of Sept. 1974.

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